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1 RECORD OF ORAL HEARING
2 UNITED STATES PATENT AND TRADEMARK OFFICE

3 _____
4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES
6 _____

7 EX PARTE CHARLES J. JACOBUS
8 _____

9 Appeal 2009-000997
10 Application 09/785,385
11 Technology Center 2400
12 _____

13 Oral Hearing Held: July 9, 2009
14 _____

15 Before JOHN A. JEFFERY, ST. JOHN COURTENAY, III, and
16 STEPHEN C. SIU, *Administrative Patent Judges.*

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18
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1 The above-entitled matter came on for oral hearing on Thursday, July
2 9, 2009, at The U.S. Patent and Trademark Office, 600 Dulany Street,
3 Alexandria, Virginia, before Dawn A. Brown, Notary Public.

4

5 JUDGE JEFFERY: We have three summer externs here from the
6 PTO that would like to observe the proceedings.

7 MR. POSA: Sure.

8 JUDGE JEFFERY: We have Alan Lowe, Nick Kirby, and Michael
9 Scapin are going to be observing. Thank you very much.

10 MR. POSA: And could I have the names of the panel members,
11 please?

12 JUDGE JEFFERY: Sure. Judge John Alan Jeffrey, that is myself.
13 Okay, we have Judge St. John Courtenay, that is C-O-U --

14 JUDGE COURtenay: C-O-U-R-T-E-N-A-Y. The first name is St.
15 John, S-T, period, J-O-H-N.

16 JUDGE JEFFERY: And we have Judge Steven Siu. That is S-I-U.

17 MR. POSA: Okay. Thank you. I appreciate it.

18 JUDGE JEFFERY: So you have 20 minutes and you can go ahead
19 and proceed.

20 MR. POSA: Thank you. And thank you also for taking the time to,
21 you know, deal with the video hook-up thing, which is -- you know, I mean,
22 it is convenient, I think, and I appreciate your involvement in that. Let me
23 start off with a bit of an apology. I mean, I hope that my Brief in this appeal
24 was not improper to the extent that there is a section of the Brief which is
25 entitled something like, you know, Indicate Any Other Appeals or

1 Proceedings That Might Have a Bearing on the Case. It is section --

2 JUDGE JEFFERY: Section 2?

3 MR. POSA: Yeah. Section 2. And I've done several appeals, and
4 I've never filled that in before because it has never been the case that I've
5 had an appeal or interference which has a direct effect. However, as you I'm
6 sure know from the record, this case went up on appeal before, and to the
7 extent I should have indicated that in this section of the Brief, I apologize.
8 And, I mean, it was just an oversight. And given the fact the previous
9 appeal was discussed in the record, I assume that everyone is on notice of
10 that.

11 JUDGE COURTENAY: Yes, we are. We have a copy of the
12 previous decision in our records here.

13 MR. POSA: I want to talk a little bit about the previous Board
14 decision because, I mean, it does create a background for this case, and I'm
15 not going to belabor it. Essentially, it was determined that content and
16 media type are equivalent. I mean, this is, in essence, what the previous
17 Board decision -- the determination that they came to. And for that reason,
18 the rejection was affirmed.

19 Now, you know, at the risk of prejudicing myself here today, we
20 didn't agree with the previous Board decision. I mean, you know, you can
21 be of your own mind on that, but we continue to insist that -- and, of course,
22 I understand the reasoning here. It is not outrageous or anything. But we
23 continue to insist that content is content and media type is media type.

24 In other words, you can -- for example, you can have the same
25 content, in our opinion, distributed through a different media type. Media

1 type is whether you have it by video or whether you can hear it, whether it is
2 in a graphical form or it is video. I mean, that is video. It is not content.
3 That is all I have I want to say about that.

4 I mean, we disagreed with the decision. We considered appealing the
5 decision, but instead of that, we decided to refile the case with amendments
6 to the claims. Now, it is our opinion that the Examiner has kind of latched on
7 to the previous Board opinion and is sort of unwilling to recognize the
8 significance of the amendments that were made along the way. Again, you
9 know, you'll come up with your own determination and interpretation of
10 that. But an amendment was made to both of the independent claims, and
11 there are two parts to it.

12 The first part is to try and sort out or to strengthen the idea that
13 content means content and it doesn't mean media. This is vis-a-vis the
14 DeSimone reference, which is, you know, the primary reference in this case.
15 The second change to the claims, both independent claims, is that these
16 routing modules or router-embedded applets permit or inhibit the
17 distribution of a particular message, again, based on content of the message.

18 All right? Now, we've argued all along that those newly-added
19 limitations are significant, and, you know, that is what I'm going to talk
20 about today.

21 Let me just say a little bit about the invention. Though it is not in
22 here, it is sort of a field of use. My client, the Appellant's invention here, is
23 a very, very large multicast network capability. And in fact, they've
24 implemented it. The client is called Cybernet Systems. It is called the
25 OpenSkies system. If you want to, go online and look at it if you're

1 interested. It is used for gaming. And they have a game -- one game is
2 called The Edge Of Extinction which is implemented on this backbone. And
3 hundreds of thousands of people, I guess, play this game. I don't have time
4 for that sort of thing, but all around the world they can play this game. But
5 the invention has to do with implementing that, making it happen. And so
6 these claims are directed to what you might consider to be an intelligent
7 backbone for those kinds of applications. And this ability to have data
8 within the message itself determine who gets things and routing permission
9 and inhibition of a message to reach somebody based upon content has to do
10 with -- basically, you would overwhelm the system if everybody got
11 everything.

12 JUDGE JEFFERY: Counsel, let me ask you a question here --

13 MR. POSA: Yeah.

14 JUDGE JEFFERY: -- just to get it straight in my mind. If I have a
15 router that is looking at incoming data and it has an IP address that tells the
16 router that I want to send that data to point A instead of point B, client A if
17 you will versus client B, why wouldn't the IP address itself constitute
18 content, quote, unquote?

19 MR. POSA: Well, look, I can see how you might like to interpret it
20 that way, but it isn't and it shouldn't be interpreted that way. And to the
21 person of skill, they would recognize that there is an absolute clear
22 distinction between an address and the thing that gets sent there. I mean, an
23 analogy would be -- and I'm not sure it's a perfect analogy. I haven't had a
24 chance to think it through. But if I send you a letter with a stamp on it, it has
25 got your name and address on it. You get it. That is not content. All right?

1 You have to open that up, take those pages out, unfold them and start
2 reading in order for you to appreciate the content. And that is the distinction
3 we're trying to make here.

4 JUDGE JEFFERY: But isn't an IP address, say, part of a header of a
5 message, perhaps? Maybe, you know, I have a message -- I have a message
6 header, let's say, that tells me the IP address of the recipient. Isn't that part
7 of the message?

8 MR. POSA: No. Well, I mean, it is part of a packet. No, I would say
9 it is not part of the message. I mean, I understand where you're going with
10 this but the answer still is no, I'm sorry.

11 JUDGE COURTENAY: Excuse me. It seems like -- if I could
12 interrupt you for a moment. It seems like we're dealing with a claim-
13 construction issue here centered around the term "content." I notice in your
14 Brief on page 3 you're pointing to a dictionary definition as comporting with
15 the ordinary and customary meaning of the term "content." But do you have
16 anything in your specification that you can point to? An express definition
17 or any way that we can broadly but reasonably construe that claim term
18 "content" in light of your specification? Is there any portion of your
19 specification you could point to?

20 MR. POSA: I don't know if I can do that today. It is a long spec, it is
21 a complicated spec, as you know, and, I mean, it might take me more time
22 than I have. But the short answer to your question I believe would be yes.
23 Because it is an important -- it is an important aspect of the invention. Let
24 me just see if I could find something. Well, I'm not sure but beginning on
25 page 12 of the spec, key innovations are discussed. And if you look at

1 number 2, for example -- again, I mean, I'm at a, you know, disadvantage.

2 It is a long and involved spec. But there are rules inserted which can
3 decode input packet data. Data, all right? Not addresses. And there are
4 other instances like this throughout the spec where they're looking after the
5 address. And that is really -- a key innovation here is it is the content of the
6 message itself and not the header, and, in fact, DeSimone in a sense more
7 like what you're talking about. I mean, it is more of a conventional system
8 wherein routing is determined by address. And the main distinction that we
9 have here is that in DeSimone, the clients determine what they want, and in
10 our invention, the content of the message itself is able to determine where it
11 goes regardless of what the client has to say. And for these enormous
12 multicast gaming applications, that is an elegant solution to the problem of
13 overloading the backbone if a lot of people want to play.

14 Now, speaking of going to specs to interpret things, I want to direct
15 your attention to the Examiner's argument regarding where in DeSimone, for
16 example, one finds this idea of having permission or inhibiting done by the
17 backbone itself. In other words, not by the client.

18 The Examiner points to a couple of places in DeSimone and doesn't
19 retreat from those. I mean, this is the Examiner's best shot at where in the
20 prior art you can find the limitations that are in our claims. All right? And
21 he points to column 4, lines 49 to 61. I'm not going to repeat them. What
22 I'm referring to here is my response --our response to the first office action,
23 and then the Examiner also points to column 5, lines 24 to 41, of DeSimone
24 as addressing these limitations regarding the ability of the backbone itself to
25 determine who gets what. And if you read those sections, it is just not there.

1 It is not taught there. And as a matter of fact --

2 JUDGE JEFFERY: But isn't the Examiner -- excuse me for a second.
3 But isn't the Examiner also relying on what one of ordinary skill in the art
4 would know about how to program a router and so on and so forth? Isn't he
5 coupling this passage with common knowledge in the art, if you will?

6 MR. POSA: I don't think so. If you could point to a passage in the
7 record where the Examiner says that that specific limitation is known.

8 JUDGE JEFFERY: Let me dig it up here in the Answer.

9 JUDGE COURTENAY: I believe it is on page 12 of the Answer.

10 JUDGE JEFFERY: Thank you. Yes.

11 MR. POSA: Okay. Let's see. Where?

12 JUDGE JEFFERY: The second full paragraph.

13 MR. POSA: Beginning, "One of ordinary skill in the art"?

14 JUDGE JEFFERY: That is right.

15 MR. POSA: No. Look, the Examiner is saying the opposite of what
16 our -- this is not our claim language. This doesn't address the limitations at
17 issue here. Whether or not one of ordinary skill in the art would understand
18 that it is the client's choice, okay, to tell the network elements which
19 message should be routed, we feel is irrelevant.

20 Let's say that it is true. That is not what we're talking about and that is
21 not what is claimed. And that is what DeSimone teaches. And if you --
22 basically, DeSimone for technical reasons replaces a plurality of multicast
23 address resolutions systems or MARS routers with a single dedicated one to
24 gain certain advantages. And the reason why this is being asserted is
25 because it is a multicast system. All right?

1 Now, Appellant didn't invent multicast. All right? That is not what
2 we're talking. There are multicast systems out there and, however, replacing
3 several of these MARS routers with a single MARS router doesn't speak to
4 adding the kind of intelligence to the messages themselves to the content
5 within the messages allowing the backbone itself to determine who gets
6 what. It just doesn't address that. So this idea of one of skill in the art
7 recognizing -- what the Examiner is saying here is that one of skill in the art
8 would recognize the teachings of DeSimone. That is our point. It is not
9 Appellant's claim language.

10 JUDGE COURTENAY: I do notice looking at claim 1, the language
11 of your claim recites, "One or more network routing modules or router-
12 embedded applets operative, in addition to normal packet routing, to prevent
13 or inhibit the distribution of a particular message based upon the content of
14 the message." So I'm focusing here on the words "in addition to normal
15 packet routing." Is it your position that normal packet routing is, as
16 described by Judge Jeffery, where you have the packet header with an IP
17 address, that your claim requires something in addition to normal packet
18 routing, as we previously discussed?

19 MR. POSA: Yes. I agree with you completely.

20 JUDGE COURTENAY: Okay. Just to be clear.

21 MR. POSA: And I would also say that DeSimone does not go beyond
22 normal packet routing. That is right.

23 JUDGE COURTENAY: We understand your position.

24 MR. POSA: That is really all I have. You know, what was just
25 argued is summarized in our Reply Brief, which was also made of record in

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1 this case.

2 JUDGE JEFFERY: Okay. MR. POSA: And, I mean, I appreciate
3 your time. If you have any questions, I'd be happy to --

4 JUDGE JEFFERY: Okay. I think that will do it. One other thing.

5 Could you spell your name for the court reporter, please, so we can get your
6 name in the record.

7 MR. POSA: P-O-S-A. John, last name is P-O-S-A.

8 JUDGE JEFFERY: Okay. Great. Thank you very much. Have a
9 good day.

10 MR. POSA: Thank you. You too.

11

12 (Whereupon, the proceedings were concluded on July 9, 2009.)

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